

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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PLI*
[Reconsideration of Protest Against Army Solicitation]

FILE: B-198850

DATE: August 29, 1980

MATTER OF: Bayou State Trucking Inc.--
Reconsideration

DIGEST:

1. Award under ambiguous solicitation, which contained conflicting provisions regarding estimated quantities, need not be disturbed where evaluation of protester's bid using proper computations, employed by contracting agency and four other bidders, remains high, since there was no prejudice to protester.
2. Where protester alleges that low bidder's price is unreasonably low, mere fact that below-cost bid is submitted does not constitute legal basis for precluding award.

Bayou State Trucking Inc. (Bayou) has requested reconsideration of our decision in the matter of Bayou State Trucking Inc., B-198850, May 28, 1980, 80-1 CPD 368, in which we dismissed as untimely Bayou's protest against solicitation No. DAHC21-80-B-0406 issued by the Department of the Army.

Our prior decision was based on the fact that Bayou had filed its protest with our Office more than 10 working days after Bayou learned of the bidding results and the fact that Bayou had misapplied the quantities set forth in the bidding schedule. Therefore, the protest was untimely under section 20.2(b)(2) of our Bid Protest Procedures (4 C.F.R. part 20 (1980)).

Bayou has now submitted evidence that it had filed a protest with the contracting officer within 10 working days of receiving the above information and had not received a response to the protest when it filed its

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protest with our Office. Based on this information, Bayou's protest was timely filed with our Office and we will consider the protest on the merits.

The solicitation was for trucking services between Gulf Outport and commercial piers in the Port of New Orleans. The following bids were timely received:

Ecilamor Drayage and Storage Co., Inc.	\$ 139,564.38
C&D Transportation Co., Inc.	245,679.19
Diaz Trucking Company	266,671.66
Maloney Trucking & Storage Co., Inc.	388,220.78
Bayou	1,611,374.00

Following bid opening, mathematical errors were discovered in four of the five bids submitted which, after correction, resulted in the following bid prices:

Ecilamor Drayage & Storage Co., Inc.	\$ 258,483.75
C&D Transportation Co., Inc.	No error
Diaz Trucking Company	267,091.60
Maloney Trucking & Storage Co., Inc.	388,644.76
Bayou	1,611,374.00*

*Bayou's bid remained the same because it would not permit the contracting officer, in view of its contention that it was the only responsive bidder, to correct the error in its bid.

The above error corrections displaced Ecilamor as the low bidder and C&D was awarded the contract. However, C&D could not obtain a required United States Customs Bond and its contract was terminated and the award made to the second low bidder, Ecilamor.

The solicitation provided at section "D-3," Estimated Quantities, that the quantities set forth in the schedule were estimated annual quantities to be used as a basis for evaluating bids. Section "F-2" stated that the term of the contract was for 3 years and section "J," Multiyear Procurements, provided that a price should be submitted for the total requirement of 3 years and that prices submitted on a single-year basis would not be considered for award.

The statement in the solicitation that the estimated quantities were for 1 year was in error and the quantities actually represented the entire 3-year requirement.

All the bidders, except Bayou, inserted unit prices for the various items and then multiplied that figure by the estimated quantities to arrive at their extended bid price. Bayou's bid contains the unit prices but these were multiplied by three times the estimated quantities to obtain the extended price.

Bayou contends that since the solicitation stated that only bids for a 3-year period would be accepted and that the quantities were, according to the solicitation, annual requirements, only Bayou's bid, which multiplied these quantities by three, was responsive.

The Army, in its report on the protest, advised that when Bayou filed its protest with the contracting officer, the other bidders were contacted to ascertain if they understood the quantities to represent the entire 3-year requirement and to verify their bids. All four of the other bidders confirmed their bid prices as being for the 3-year term of the contract. Moreover, when Bayou's bid price is divided by three to place Bayou on an equal footing with other bidders for evaluation purposes, its bid price of \$537,124 remains high.

Accordingly, while the solicitation was ambiguous regarding the estimated quantities, we do not find Bayou to have been prejudiced. Using the correct term of the contract Bayou remains the high bidder and not in line for award. Kleen-Rite Corporation, B-193731, May 11, 1979, 79-1 CPD 337.

Finally, Bayou argues that contrary to the position of the contracting officer, its bid price is not "so far out of line" because the other bidders did not understand the portion of the specifications which required services in addition to the line items listed in the schedule. Paragraphs 13 and 15 of section "F" require the contractor to perform nonrelated services incidental to drayage, including servicing vehicles by replacing tires, antifreeze, and other safety functions. The contractor also must assume the costs associated with off-loading drayed vehicles and cargo of all types.

Bayou, in effect, is alleging that the other bidders bid too low to properly perform the contract as required. As noted above, all other bidders verified their bid prices and the awardee is currently performing the contract.

We have held in prior decisions that the mere fact that a bidder may have submitted a below-cost bid does not constitute a legal basis for precluding a contract award. Kleen-Rite Corporation, B-190411, November 8, 1977, 77-2 CPD 354.

To reject a bid as being unreasonably low would require a determination that the bidder is not responsible. However, with regard to an affirmative determination of responsibility of a bidder submitting a below-cost bid, this Office no longer reviews protests against affirmative determinations of responsibility, unless either fraud is shown on the part of the procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. In the present case, there is no allegation that the affirmative responsibility determination resulted from either fraud or that definitive criteria have not been applied.

Regarding the protester's contention that the contract will not be performed properly, it should be pointed out that whether the contractor is complying with the contract requirements is a matter of contract administration not for consideration under our Bid Protest Procedures, 4 C.F.R. part 20 (1980). See Robert Burger Associates, Inc., B-188450, June 1, 1977, 77-1 CPD 378. It is the Army's responsibility to take appropriate action if the contract is not properly performed.

The protest is denied.

Harry R. Van Cleave
For the Comptroller General
of the United States